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IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Solicitor General acknowledges (Opp. 5) that the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, gives each State "*primary* responsibility" for assuring air quality within its borders. *Id.* at § 7407(a) (emphasis added). A "key" tool in "manag[ing] * * * allowed internal growth" under the Act, *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 364 (D.C. Cir. 1980), is the ability to determine BACT for particular sources, and the CAA squarely "places this responsibility *with the State*, to be determined in a case-by-case judgment." S. Rep. No. 95-127, at 31 (1977) (emphasis added). Exercising its authority in this case, the State of Alaska considered the requisite statutory factors and made a permitting decision that would not only result in cleaner air than if the EPA's choice of technology had been selected, but

that recognized "the importance of the [Red Dog] mine to the regional economy of the Northwest Arctic Borough." PER 387. In overriding Alaska's BACT determination, the EPA plainly usurped the State's authority under the CAA, upsetting the delicate balance of power between the States and the federal government that Congress carefully sought to create under the Act and numerous similar statutory schemes embodying the principle of "cooperative federalism."

As evidenced by the numerous amici who urge this Court to grant review in this case,[1] the question presented here is one of undeniable national importance. The United States asks this Court to ignore the significance of this case, as well as the multiple conflicts between the Ninth Circuit's decision below and those of this Court and other federal courts of appeals. But a decision with such troubling and far-reaching implications should not be permitted to stand unreviewed.

1. The Ninth Circuit's decision conflicts with decisions of this Court and those of other federal courts of appeals on the basic jurisdictional question of how federal-state authority is allocated under the CAA. *See* Pet. 14-19. In response, the Solicitor General goes for the capillaries, stressing that the decisions cited in the petition actually involved different subsections of the CAA than those involved here. *See* Opp. 12-16. But such pettifoggery cannot obscure the fundamental conflict between the Ninth Circuit's decision and the decisions of this Court and other federal courts of appeals. Whereas other courts have recognized and respected the basic "division of responsibilities" between the States and the federal government under the CAA, *Train* v. *Natural Re-*

[1] *See* Brief of Amici Curiae States of North Dakota, Wyoming, Alabama, Delaware, Iowa, Montana, Nebraska, Nevada, South Dakota, and Utah in Support of Petitioner; Brief Amicus Curiae of the Center for Energy and Economic Development in Support of the Petition for Writ of Certiorari; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petition for a Writ of Certiorari.

sources Defense Council, Inc., 421 U.S. 60, 79 (1975), and have refused to allow the EPA to infringe upon the States' authority by acting as the primary regulator in those areas where that responsibility has been given to the States, the Ninth Circuit disregarded Congress's careful allocation of power under the Act, and permitted the EPA to usurp authority clearly reserved to the States.

a. In its green eyeshade zeal to distinguish the cases cited in the petition, the federal government glosses over *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (D.C. Cir. 2002), a case involving a provision of the CAA strikingly similar to the one at issue here. Section 169A of the CAA requires the States to determine the best available retrofit technology ("BART") for particular sources by taking into consideration certain enumerated statutory factors. *See* 42 U.S.C. § 7491(g)(2). Section 169(3) likewise requires the States to determine BACT by taking into account certain enumerated statutory factors. *See* 42 U.S.C. § 7479(3) ("best available control technology" means an emission limitation * * * which the permitting authority [*i.e.*, the State], on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility"). In *American Corn Growers*, the D.C. Circuit refused to allow the EPA to dictate to the States the manner in which they were to make BART determinations, holding that the EPA's attempt to do so was "inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id.* at 8. In sharp contrast, the Ninth Circuit in this case permitted the EPA to dictate Alaska's BACT determination, notwithstanding the Act's provisions giving the States broad authority over BACT determinations. This irreconcilable conflict alone provides a compelling basis for review.

b. Attempting to dismiss the conflict between the decision below and this Court's decision in *Train*, *supra*, the United States notes that in *Train* this Court "expressly

recognized EPA's oversight role." Opp. 13-14. That observation, however, was in the context of considering a provision of the CAA that *expressly* required the EPA's approval of a SIP variance. *See* 421 U.S. at 75 (quoting since-repealed Section 110(a)(3)(A) of the CAA). Here, by contrast, no provision of the CAA gives the EPA the authority to invalidate a State's BACT determination. To the contrary, the CAA expressly provides the States with broad discretion to make case-by-case BACT determinations. *See* 42 U.S.C. § 7479(3). Moreover, the Court's observation in *Train* that "the CAA 'imposes a duty of enforcement on the Agency' to enforce a SIP's emission limitations," Opp. 14 (quoting *Train*, 421 U.S. at 92-93 n.27) (emphasis omitted), is of no significance here, where it is undisputed that Alaska's permitting decision did not violate its SIP emission limitations. The Solicitor General's observation that the court in *Alabama Power, supra*, "recognized EPA's authority to 'prevent or correct a violation of the increments,' " Opp. 16, is likewise besides the point, because all agree that this case does not involve an increment violation.

c. The Solicitor General also attempts to dismiss the conflict with Seventh Circuit's decisions in *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984), and *United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994), by noting that the EPA in this case took action before Cominco's permit was issued. *See* Opp. 16 & n.9. But the United States does not—and cannot—deny that the Ninth Circuit's decision grants the EPA unfettered discretion to invalidate a State's BACT determination at any time, even years after a permit has been issued and a source has invested in technology approved by the State. The Ninth Circuit's decision thus casts a cloud of uncertainty over state PSD permitting decisions, and threatens to subject regulated entities to increased bureaucratic delay. *See* States Amicus Br. 11.

d. The Solicitor General's reliance (Opp. 17) on *Public Service Co.* v. *EPA*, 225 F.3d 1144 (10th Cir. 2000), is misplaced. That case involved the quite different question whether a particular source was required under the CAA to obtain a PSD permit in the first place. If the source were in fact required to do so, the EPA could take steps to enforce that requirement. *See* 42 U.S.C. § 7413(a)(5). That accounts for the court's passing statement that the EPA could ultimately overturn the State's decision in *that* regard. *See* 225 F.3d at 1147. The court by no means suggested that the EPA would be free to override a determination—such as BACT—that the CAA plainly commits to the State's discretion through the case-by-case weighing of a variety of factors.

2. The national importance of this case is undeniable. The question presented affects thousands of entities across the nation. Indeed, the federal government itself acknowledges "the national importance of the BACT requirement." Opp. 18. Congress gave the States broad discretion to make BACT determinations that specifically take into account "considerations as anticipated and desired economic growth for the area." S. Rep. No. 95-127, at 31. The Ninth Circuit's decision strips the States of their authority to make "flexible" BACT determinations, *id.*, in "manag[ing] their allowed internal growth" under the CAA. *Alabama Power*, 636 F.2d at 364. If Alaska is not allowed the flexibility to make a BACT determination that actually results in cleaner air while taking into account particular local conditions in a community above the Arctic Circle, it is difficult to imagine what Congress had in mind in the CAA. And the Ninth Circuit's decision is even more far-reaching, threatening the balance of power struck by Congress and the States under numerous other "cooperative federalism" statutory schemes. *See* Pet. at 21-22.

The United States maintains that the Ninth Circuit's decision will not "disrupt[] * * * federal-state relations under the CAA." Opp. 21. The States that have filed a brief in support

of certiorari see things differently, arguing that the decision below "skews the federal-state partnership envisioned by Congress" under the CAA, and that it will have "an enormous effect" on the implementation of all state permitting programs. States Amicus Br. 1, 11. As the States explain, as a result of the Ninth Circuit's decision, regulated entities are "left with uncertainty whether and when EPA will choose to inject itself into the state permitting process," and thus will have little incentive to work with the States on BACT and other permitting issues. *Id.* at 11. Moreover, because the EPA can override a State's BACT determination at any time, the decision below will inevitably lead to a "waste of state resources." *Id.* at 3. The States urge this Court to grant review in this case and "correct the imbalance wrought by the Ninth Circuit's decision." *Id.* at 1.

3.a. The Ninth Circuit's decision not only has precipitated conflicts on a question of national importance, but it is also wrong. Nothing in the CAA gives the EPA unilateral authority to overturn a State's case-by-case BACT determination.[2] The fact that a State weighs the statutory factors differently than the EPA in any particular case does not mean that the State has in any sense violated a requirement of the Act, authorizing the EPA to overturn the State's judgment. There is simply no support in the CAA for the federal government's conclusion—and that of the Ninth Circuit—that the States have only " 'initial responsibility' " for determining BACT. *See* Opp. 19 (quoting Pet. App. 11a).[3]

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[2] A State's BACT determination, however, may not permit a facility's emissions to exceed the NAAQS, PSD allowable increments, or other standards established under the Act. *See* 42 U.S.C. §§ 7475(a)(3), 7479(3). Moreover, in one narrow circumstance—an exception that proves the rule—the CAA specifically requires the EPA's approval of a particular BACT determination. *See id.* § 7475(a)(8).

[3] Invoking *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Solicitor General argues

Nor is there any support in the Act's legislative history. The United States relies on excerpts stating, for example, that the EPA could take action " 'to stop a permit * * * which * * * did not comply with the requirements of [the PSD program], including the use of [BACT].' " Opp. 19 n.10 (quoting S. Rep. No. 95-127, at 12). But apart from the requirement that no major emitting facility may be constructed or modified in a clean air area unless "the proposed facility is subject to [BACT]," 42 U.S.C. § 7475(a)(4), the only BACT "requirement" imposed by the Act is that a *State* take into account "energy, environmental, and economic impacts and other costs" in determining BACT. *Id.* § 7479(3). As discussed, nothing in the CAA authorizes the EPA to overturn a State's particular BACT determination based on the consideration of the pertinent statutory factors.

Like the Ninth Circuit below, the Opposition completely ignores the most pertinent legislative history—that making clear that "[t]he decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility with *the State*, to be determined in a case-by-case judgment." S. Rep. No. 95-127, at 31 (emphasis added). *See also id.* ("It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted,

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for deference to certain EPA guidance documents and an EPA legal opinion "[i]nsofar as any ambiguity exists in the statutory provisions" at issue. Opp. 21-23 & n.14. Those provisions, however, do not admit of any ambiguity. Moreover, the federal government has already lost the argument that such documents—not promulgated in the exercise of congressionally delegated authority to make rules carrying the force of law—are entitled to *Chevron* deference. *See United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The Solicitor General also cites EPA responses to comments in various rulemakings, *see* Opp. 22, but none of those responses express the view here that the EPA may overturn a BACT determination because it disagrees with the State's analysis of the statutory factors in a particular case.

depending on site.") (emphasis added); *id.* ("The weight assigned to such factors is to be determined by the State."); *id.* (BACT is "strictly a State and local decision").

b. Importantly, this is not to say that the EPA is without recourse when it believes a State has made an unreasonable BACT determination. The CAA provides that each State must—as Alaska did here—"transmit to the [EPA] a copy of each [PSD] permit application relating to a major emitting facility received by such State and provide notice to the [EPA] of every action related to the consideration of such permit." 42 U.S.C. § 7475(d). In this case, the EPA was free to participate in the public comment process on Cominco's draft permit, and then, if it still disagreed with the State's action, challenge Alaska's BACT determination through the administrative review process, which includes a right of judicial review. *See* Pet. 18-19. The Solicitor General does not dispute that the EPA could have pursued this remedy.

What the EPA may not do, however, is unilaterally substitute its judgment for what constitutes BACT whenever it disagrees with a State's determination. That is precisely what the EPA did here. Long before Alaska issued Cominco's PSD permit and a final TAR explaining the basis for its determination that Low NOx was BACT for the MG-17 generator, the EPA informed the State of *its* view that SCR was BACT for the generator. *See* PER 385. Throughout the negotiations that followed, the EPA never budged from that position. Indeed, in its order blocking the issuance of Cominco's permit, the EPA did not admonish Alaska to provide "a reasoned justification of the basis of its decision," Opp. 20 (emphasis and quotation omitted), but rather demanded that the State "satisfactorily document[] why SCR is not BACT for the [MG-17] generator." Pet. App. 36a.

c. Moreover, Alaska *did* provide a reasoned justification for its BACT determination in this case.[4] The State spent nearly ten pages explaining the basis of its decision, specifically taking into account "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). After initially rejecting Cominco's contention that requiring SCR would have adverse environmental and energy impacts, the State concluded that SCR was not economically feasible because of its "excessive economic cost"—$2.9 million in capital costs and annual operating costs approaching $635,000. PER 051. Indeed, the United States does not dispute that SCR has *never* been required as BACT for a similar type of generator. Recognizing the Red Dog Mine's importance to the particularly vulnerable and isolated local community, the State decided not to impose a prohibitively expensive technology that might affect the mine's "world competitiveness." *Id.* Alaska's BACT determination in this case was precisely the sort of determination Congress intended States to make under the CAA, which specifically directs the States to consider "economic impacts" in determining BACT on a case-by-case basis. 42 U.S.C. § 7479(3). *See also* S. Rep. No. 95-127, at 31 (States to take into account such considerations as "*anticipated and desired economic growth for the area.*") (emphasis added).[5] The

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[4] The Opposition incorrectly states that the petition does not challenge the Ninth Circuit's determination that the EPA correctly concluded that Alaska had not provided a reasoned justification for its BACT determination. *See* Opp. 20. That issue is squarely embraced by the question presented—"[w]hether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska." Pet. i. Moreover, the petition specifically demonstrates that Alaska made a "carefully considered determination that Low NOx was BACT for the MG-17 generator." Pet. 8. *See also id.* at 20-21.

[5] The concern that "States might be tempted to engage in a destructive competition to attract industry through lax implementation of the environmental laws," Opp. 23 (citing Pet. App. 16a), is

State's permitting decision, moreover, resulted in *cleaner* air than would be the case under the EPA's preferred approach,[6] while allowing the creation of more jobs for the precarious economy of the Northwest Arctic Borough. That is how "cooperative federalism" is supposed to work.

* * *

For the foregoing reasons, and those in the petition and the briefs amicus curiae, the petition for a writ of certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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misguided in this case, because the Red Dog Mine—the world's largest source of zinc concentrate—is not going anywhere.

[6] The Solicitor General does not deny that the State's permitting decision in this case was expected to result in *lower* emissions than if the technology preferred by the EPA were installed on only the MG-17 generator.